SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. [redacted] 200

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

Memorandum on Behalf of Plaintiff-in-Error on Motion to Advance.

CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

APPEAL PRINTING COMPANY, NEW YORK.

IN THE

Supreme Court of the United States.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased,
Defendants-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

In respect of the motion of the defendants-in-error to advance the above entitled case for hearing, plaintiff-in-error would respectfully say that it has no objection to the cause being advanced, but that it desires to orally argue the appeal, and, therefore, by urging no objection to said advancement, does not wish to be deemed to consent that said appeal be submitted without oral argument but, on the contrary, wishes to insist upon its right to orally argue said appeal. Nor does the plaintiff-in-error wish to be understood, in not objecting to said advancement, to admit either the accuracy of the statements of fact or the soundness of the conclusions of law contained in the brief of the defendants-in-error filed on this motion to advance.

Respectfully submitted,
CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

SUBJECT INDEX.

IN THE

Supreme Court of the United States.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

v.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Hartford B. Kirk, deceased,
Defendants-in-Error.

BRIEF OF PLAINTIFF-IN-ERROR.

Statement of the Case.

This is an action instituted by the defendants-in-error (the plaintiffs below) as executors of the Last Will and Testament of Hartford B. Kirk, late of the City, County and State of New York, deceased, for the recovery of $26,500, claimed to be due by virtue of the alleged ownership of certain alleged bonds of the plaintiff-in-error as set forth in the complaint (fols. 5-9).

The plaintiff-in-error is a corporation organized and existing under the laws of the State of Ohio, and is engaged in operating street railroads and electric properties in the City of Toledo in said State (fol. 22). That said incorporation, as stated in its articles of incorporation, is formed

for the purpose of constructing, maintaining, operating, extending, purchasing, acquiring, leasing and owning street railroads and railroads operated as street railroads, to be operated by electric power, together with all the property, real, personal and mixed, and all franchises, rights and privileges respecting the use and operation of the same and for purposes incidental thereto in the City of Toledo, Lucas County, Ohio, and of doing all matters and things proper to such business, including the manufacturing, procuring, providing, furnishing, conveying and distributing of all power, heat and light that is now, or may hereafter, be found to be proper, convenient or desirable in the carrying out of such purpose and incidental to such purpose, and to use, maintain and operate all electric light and power property, rights, privileges and franchises which said corporation may lease or purchase.

The defendants-in-error attempted to institute this suit in the Supreme Court of the State of New York, for the County of New York, and to serve a summons and a copy of a complaint in this action on the plaintiff-in-error, by delivering the same, on or about June 29th, 1914, to one Frank W. Frueauff, who is, and then was, a Vice-President and Director of the plaintiff-in-error, and who resided in Garden City, Long Island, New York (fol. 25).

Subsequently thereto, by petition duly filed, in which plaintiff-in-error appeared specially for the purpose of the petition solely (fols. 10-14), the case was removed to the District Court of the United States for the Southern District of New York (fol. 15).

After said removal plaintiff-in-error, still appearing specially, moved to vacate and set aside

the attempted service of process herein on the plaintiff-in-error on the ground that said service was insufficient and ineffectual to give the Court jurisdiction over the person of the plaintiff-in-error (fols. 19-49) for the reason that the plaintiff-in-error was a corporation foreign to New York State, that it transacted no business, maintained no office and owned no property in said State at the time of the attempted service of process. This motion was denied (fols. 55-56).

The plaintiff-in-error then served its answer to the complaint (fols. 58-65).

At the opening of the trial of the action, the plaintiff-in-error duly renewed its motion to quash service herein and to dismiss said action for want of personal jurisdiction, and said motion, as thus renewed, was denied upon the authority of the prior order and because made after answer on the merits (fols. 66, 76). Counsel for plaintiff-in-error thereupon stated that he would take no part in the trial of the action except to object to the Court's jurisdiction, and at proper subsequent stages of the trial he renewed said motion which was in each case denied (fols. 66, 76). At the close of the plaintiff's case a verdict was directed in favor of the defendants-in-error for the full amount of the complaint, to which plaintiff-in-error excepted and judgment was entered accordingly (fols. 67-69).

Defendants-in-error thereupon petitioned for a writ of error (fols. 80-81) which was allowed (fol. 82), obtained a certificate to the United States Supreme Court as to a question of jurisdiction (fols. 75-79) and filed assignments of error (fols. 84-85).

A specification of the errors relied upon and intended to be urged on this appeal is as follows:

1. That the court erred in holding that the defendant by reason of its issuing certain bonds, the principal whereof is payable in the City of New York, in 1909, at the fiscal office of the company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state.

2. That the court erred in holding that the defendant by reason of its issuing bonds, the principal whereof was payable in the City of New York in 1909 at the fiscal office of the company in said City, should be conclusively presumed to have maintained said fiscal office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York, but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation.

3. That the Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant.

4. That the Court erred in denying the motion of the defendant to quash the service of summons

attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant when said motion was renewed at the opening of the trial on the ground that the defendant had filed an answer on the merits even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant.

5. That the Court erred in entering a judgment against the defendant which, if enforced against the defendant in accordance with its terms, would, by reason of the absence of personal jurisdiction over the defendant, constitute a taking of its property without due process of law.

POINT I.

The attempted service of process in this action was ineffectual and invalid and, therefore, the Court was without jurisdiction over the person of the plaintiff-in-error and without power to enter judgment in this action.

It is a fundamental proposition that no action can be tried on its merits until all parties involved in the controversy have been given such due notice as will enable them to prepare to defend their rights. It is equally well settled by a long line of decisions in the Federal Courts that it is not such due service on a corporation foreign to the State in which the action is brought, to deliver a writ or other process to an officer or agent of such corporation within said State unless the corporation was engaged in business in the State sued in and the process was served on its duly authorized repre-

sentative who is carrying on said business. This doctrine is so firmly established and has been applied so frequently by this Court in many decisions that we deem it sufficient to refer merely to the language of the Court in some of those decisions without discussing the cases at length.

In St. Clair v. Cox, 106 U. S., 350, Mr. Justice Field unequivocally laid down this rule in the following language, p. 359:

> "Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member, for instance, of the foreign corporation, that is, a mere stockholder—is not a departure from the principle of natural justice mentioned in Lafayette Insurance Co. v. French, which forbids condemnation without citation, it is sufficient to observe that we are of opinion *that when service is made within the State upon an agent of a foreign corporation, it is essential,* in order to support the jurisdiction of the Court to render a personal judgment, *that it should appear* somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or the finding of the Court—*that the corporation was engaged in business in the state.* The transaction of business by the corporation in the state, general or special, appearing, a certificate or service by the proper officer on a person who is its agent there would in our opinion, be sufficient *prima facie* evidence that the agent represented the Company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the Company, that his duties were limited to those of a subordinate employee, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

That decision was followed in Goldey v. Morning News, 156 U. S., 518, where Mr. Justice Gray said, pp. 521, and 522:

> "It is an elementary principle of jurisprudence, that a Court of Justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the Courts of any other government." * * *
>
> "So a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there." * * *
>
> "For the same reason, service of mesne process from a Court of a State, not made upon the defendant or his authorized agent within the state, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the Court."

The rule was again applied in Green v. Chicago, Burlington & Quincy Railway, 205 U. S., 530. After discussing the facts there involved, Mr. Justice Moody said, pp. 533 and 534:

> "The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. * * *
>
> "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

In the case of Herndon-Carter Co. v. Norris, 224 U. S., 496, Mr. Justice Day said, p. 499:

> "*It has frequently been held in this Court* that a foreign corporation, in order to be subject to the jurisdiction of a court, must be doing business within the state of the Court's jurisdiction, and service must there be made upon some duly authorized officer or agent."

And again in St. L. S. W. Railway Co. v. Alexander, 227 U. S., 218, the same learned Justice said, p. 226:

> "*A long line of decisions in this Court has established* that in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."

See aso the following authorities:

Reilly v. Philadelphia & R. Ry. Co., 109 Fed., 349.

U. S. Graphite Co. v. Pac. Graphite Co., 68 Fed., 442.

Rust v. U. S. Waterworks Co., 70 Fed., 129.

Swann v. Mutual Reserve Fund, L. Assn., 100 Fed., 922.

Cady v. Associated Colonies, 119 Fed., 420.

Central Grain & Stock Exchange v. Board of Trade, 125 Fed., 463.

Louden Machinery Co. v. Am. Mal. Iron Co., 127 Fed., 1008.

Buffalo Sandstone Brick Co. v. Amer. S. B. Machinery Co., 141 Fed., 211.

Johnson v. Computing Scale Co., 139 Fed., 339.

Phelps v. Connecticut Co., 188 Fed., 765.

Wilkins v. Queen City Sav. Bnk. & Tr. Co., 154 Fed., 173.

Case v. S. L. & Co., 152 Fed., 730.

West v. Cincinnati, etc., Co., 170 Fed., 349.

Craig v. Welch Motor Car Co., 165 Fed., 554.

Goepfert v. C. G. T., 156 Fed., 196.

McGuire v. Great Northern Ry. Co., 155 Fed., 230.

This brings us to a consideration of the question as to whether or not the plaintiff-in-error, The Toledo Railways and Light Company, was "doing business" in New York State at the time of the attempted institution of this action.

The principal business of the Toledo Railways and Light Company is the operation of street railroad and electric properties at Toledo, Ohio, and its principal office is situated in said City. The affidavits of Frank R. Coates, its President (fols. 21-23), and said Frank W. Frueauff (fols. 24-26, 36-39), state the location of said principal office and of said business, and also the following:

That the board of directors of said Company consists of nineteen members, all of whom reside without the State of New York with the exception of three (fol. 23); that Mr. Frueauff though elected as director in April, 1913, was elected a vice-president only in January, 1914, about five months previous to the attempted institution of this action (fol. 25); that since said election as director and vice-president, Mr. Frueauff has never been actively engaged in, or connected with the executive management of the Company, nor has he ever performed any executive duties in connection with the offices he holds; that he has never represented the defendant corporation in any business or transaction in New York State (fol. 25); that he has never received any salary as a director or vice-president, or in any other capacity from said Company (fol. 38); that he is a member of the firm of Henry L. Doherty & Company, public utility financiers and experts, which said firm is consulted as experts on financial engineering and other problems by public utility companies including The Toledo Railways and Light Company, which are subsidiaries of Cities Service Company, a Delaware corporation, in which the firm of Henry L. Doherty and Company is interested (fols. 36 and 37), for which said firm receives a consideration; that at the time of the institution of this action,

The Toledo Railways and Light Company was transacting no business, owned no property and maintained no office in New York State (fols. 23, 25 and 39).

Defendants-in-error contend that on the other hand the Company issued a series of bonds in August, 1901 (25 of which are the basis of this suit), in which the Company covenanted to pay the principal thereof on July 1st, 1909, "at the fiscal office of said Company in the City of New York" with interest payable semi-annually upon presentation of coupons "at the fiscal office of the Company in the City of New York" (fols. 45-49); that the bonds were secured by a mortgage or deed of trust to the United States Mortgage and Trust Company, as Trustee, of the City of New York, said bonds not to be valid until authenticated by said Trustee (fol. 32).

It further appears, from the papers submitted on behalf of the plaintiff-in-error, that said series of bonds when the same were issued were sold to the New York banking firm of Kean, Van Cortland & Co., which firm sold them to its customers (fol. 39). That for the convenience of those customers the interest was made payable at the office of said Kean, Van Cortland & Co., in said City (fol. 38), and was so paid there until about the year 1909, when the Company defaulted in its interest on said bonds, after which said firm of Kean, Van Cortland & Co., ceased to act for the Company in any capacity whatsoever (fol. 39).

From the facts disclosed by the record two questions are raised:

I. Was The Toledo Railways and Light Company ever doing business in New York State by virtue of the fact that the principal and interest of

its bonds were made payable in New York, and that its interest was actually paid there at the office of Kean, Van Cortland & Co., during a certain period?

II. At the time of the attempted service of process, was The Toledo Railways and Light Company doing business in New York State?

The last question is material in the disposition of this case but is only important insofar as this case is concerned.

But the first question is of far greater moment than the mere result of this appeal, and the effect of the decision of this case is of far reaching consequence to corporations over the entire country, especially in view of the language employed by the learned Court below in its decision on the motion to quash service of process. The reasons why the first question is of such importance are these:

Corporations throughout the country, and in fact throughout the Continent, if they do business on a considerable scale, eventually enter into negotiations with a banking house situated in a financial center, particularly New York, for the purpose of effecting their corporate financing. If the financial arrangements involve the purchase and sale of bonds (as they usually do), the New York banking house, which will sell the bonds so purchased to its customers, invariably insists that the principal and interest of the bonds be made payable in New York City, and usually over their own counter, in order to facilitate the presentation of the interest coupons and the bonds for payment, and thus promote the convenience of their customers. It is a matter of common knowledge that there is scarcely any issue of bonds put out through a New York banking which are not made payable, principal and interest, "at the office or agency of

the Company in the City of New York" or "at its fiscal office in the City of New York," and similarly a New York trust company is used as a Trustee under the mortgage securing the bonds; and the more remote from New York City the business and office of the Company issuing the bonds is situated, the more insistent is the banking house that provision be made for the payment of principal and interest in New York City, for the facility of its customers. In many cases, "such office or agency" or "fiscal office" is the very office of the banking house which does the financing. In other cases it is the office of the trust company which is Trustee under the mortgage. And all this is quite irrespective of where the usual or ordinary business of the borrowing company is transacted. And this will continue to be the case as long as New York City is the financial center of the continent, and if some other city becomes the financial center then the financing will be accomplished through some banking house of that city, and the principal and interest of the bonds will be made payable there, even though the company be engaged in working mines in Mexico or operating railroads in Alaska.

Now if it is to be held that an agreement to pay bond interest and principal in New York City, and the actual payment of such interest in New York City is to be construed to be a doing of business in New York, then a multitude of corporations, whose works and business are located in various parts of the North American Continent, will be forced to defend suits brought against them in New York, by service on an officer found here, and the New York Courts will be flooded with such actions.

This is a serious question and one of far greater

importance than the mere disposition of this case and this question is raised by the language of the learned Court below in his opinion in this case. He said (fol. 53):

> "The defendant issued certain bonds and promised to pay those bonds and the interest upon the same in the City of New York.
>
> The contract evidenced by the bonds became, therefore, a New York contract.
>
> Obviously the contract could not be performed—the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York.
>
> It has maintained officers within the State of New York; Mr. Frueauff is one of them.
>
> If, therefore, any action had been begun against this Company (at least in relation to these bonds) on or before July 1st, 1909, and service had been effected upon the vice-president of the Company within the State of New York, he being a resident of that State, it seems to me that the service would have been perfect and exactly within Lumberman's Insurance Company v. Meyer, 197 U. S., 407.
>
> What is the difference now? The defendant company is still in existence, it still has directors and a vice-president resident within the State of New York; but it is asserted that no business is or can be done in the State of New York because it refused and neglected to pay a debt which it had promised to pay in this City on July 1st, 1909.
>
> It seems to me that this is a very dishonest argument and that the defendant having (in effect) agreed to engage in business in New York for the purpose of paying its debts, should be conclusively presumed to have kept its own agreement until such debt is paid or merged in judgment."

In brief the decision is that any corporation

agreeing to pay its bonds, principal and interest, in New York State, is doing business in New York State.

We submit that the reasons advanced by the learned Court below are not sound. Assume for example the simple case of a foreign corporation borrowing money from a New York bank on promissory note payable at the bank's office. This would be a New York contract. Then according to the learned Court below "the contract would not be performed—the admitted debt could not be paid, unless the defendant corporation did business within the State of New York." Such a doctrine, we submit, cannot be sustained. The borrowing of money and its payment is not necessarily the doing of business. It may be, and usually is a mere incident to the doing of the usual and ordinary business of the Company and a means of enabling the Company to carry on such business. Similarly the borrowing of money evidenced by bonds with interest coupons attached, and the payment of such bonds and coupons, is not the transaction of business by the Company. It is done to put the Company in funds to transact its business.

It is clear that the learned Court below begs the entire question presented, when he stated that the admitted debt could not be regularly paid unless the defendant corporation did business within the State of New York, for one of the essential questions before him was whether or not the agreement to pay the debt, or the paying of the same, constituted the transaction of business.

We submit that the authorities on the question uphold our position. While we do not intend to review at length the multitude of decisions which

endeavor to define the term "doing business," we beg to call the attention of this Court to some cases which involve facts analogous to the present situation.

In the case of Honeyman v. Colorado Fuel and Iron Company, 133 Fed., 96, service was made upon a foreign corporation by serving a director, resident in New York. The question arose as to whether or not the Company was doing business in New York. The complainant urged that it was doing business because:

I. It had, in the City of New York, an office, and officers, and facilities for registering stock.

II. It kept a bank account in New York.

III. The directors met in New York for the performance of duties.

IV. Certain transactions relating to capital were in progress in such State.

Thomas, D. J., held that the fact that the Company has an office in New York for the registration of transfers of stock and that it had a bank account in New York City, upon which checks were drawn by officers out of the State, did not constitute the doing of business; that there was no evidence as to the nature of the business transacted at the directors' meetings in New York State, and, therefore, the mere fact of the holding of the meetings in New York could not be held to be a doing of business there; and the fact that a plan was in progress to re-assemble the properties of the Company, under common ownership through a committee, did not constitute in itself the doing of business, even though the corporation is privy to the arrangement, had consented to carry it out

and will do what is necessary to carry it out when the plan is ready for final consummation, for, he concludes, there is no presumption that the Company will do any act in the State of New York in the fulfillment of the plan. He goes on to say (page 99):

> "The litigation proposed in the suit at bar obviously relates to the capital of the corporation, *and its relation to its bondholders and creditors.* Such a litigation properly should be conducted under the sovereignty that authorized the corporation or directly or impliedly permits it to do business within its borders, and where such business , in *real substance* is done. It is very evident that the actual business for which the corporation was organized, and which it usually carries on, is not to the slightest extent done in the State of New York."

The case of Union Trust Company v. Sickels, 109 N. Y. Supp., 262 (App. Div., 4th Dept.), involves an action on contract, in which the defendant demurred to the complaint on the ground that the corporation was doing business in New York without having procured a license from the Secretary of State, and that, therefore, it could not maintain such an action in the New York Courts.

Robson, J., delivered the opinion of the Court, and said in part (page 265):

> "What the expression 'doing business' or to 'do business', within this state, as used in the statute, really means, has received judicial attention in may cases; but, except in the present case, it does not seem to have been yet held that a foreign corporation was doing business in this state, within the meaning of the statute, when it had done no business therein beyond presenting for sale and *selling*

to individual purchasers, or floating on the market, either its stocks or its bonds. Payson v. Withers, 19 Fed. Cas., 29, 30 (No. 10,864). The plain reading of the statute shows that it was intended to prevent a foreign stock corporation from doing in this state the business for the doing of which it was organized until it had procured the required certificate, *and that it does not contemplate a prohibition either of the sale of its stock or borrowing money on its obligations. It obviously relates only to the regular and customary business operations of the corporation.* Potter v. Bank of Ithaca, 5 Hill, 490; People v. Horn Silver Mining Co., 105 N. Y., 76, 11 N. E., 155; Beard v. Union & American Pub. Co., 71 Ala., 60-62. What business the United States Independent Telephone Company was organized to conduct does not appear in the complaint, except as its name may give some indication of its character. But in what place, or within what territory, that business was to be conducted, or was actually carried on, does not appear, either by direct allegation or warrantable inference, from any fact disclosed by the complaint. It follows that the complaint does not show that this company was doing business in this state, and therefore, on the facts now appearing, neither it nor its assignee was precluded by the statute referred to from maintaining an action on the contract set forth in the complaint."

The case of People v. Feitner, 78 N. Y. Supp., 1017 (App. Div., First Dept.), is concerned with a tax statute of New York state imposing taxes for "doing business" in the State.

McLaughlin, J., said in part (page 1018):

> "But this corporation was not doing business in the State of New York in the sense in which that term is used in the statute. * * * The office which it had here was used simply

> for the purpose of enabling the directors to meet in it and declare dividends upon its preferred stock, and the cash on hand and money in bank was for the purpose of paying such dividends when declared. * * * Can it be said, simply because a foreign corporation has an office in the State of New York, in which directors meet for the purpose of declaring dividends, and then has money sent from its principal office to New York, with which to pay those dividends, that it makes it liable to taxation? Manifectly not."

In the case of Wadsworth v. The Equitable Trust Company of New York, 153 App. Div., 737, Dowling, J., held (page 739):

> "Upon the agreed state of facts, it appears that the Pacific Gas and Electric Company has never owned, rented, occupied or had an office of its own within the State, nor any office for the transaction of business therein, nor had it transacted any business therein. The defendant, as its transfer agent, keeps certain books in New York City which are used for the purpose of entering transfers of stock, duplicate sheets of which are sent to the transfer office of the Pacific corporation in the State of California. It is apparent, therefore, that no portion of the business for the transaction of which the foreign corporation was organized is carried on within this State. The maintenance by it of a transfer office in New York City was for the convenience of stockholders and facilitated the sale of its stock, but it did not constitute 'doing business' or the 'transaction of business' within the meaning of the statute."

It is apparent from the decisions above that the term "doing business" should be construed to mean the doing of the ordinary and usual business for which the Company was formed, and has no con-

nection with those acts whereby the Company acquired funds wherewith to carry on said business, or its agreements for taking care of its obligations when the same mature.

In concluding our discussion of this point we beg to again call the attention of this Court to the far-reaching consequences of their decision of this question.

Conceding for the moment that the Toledo Railways and Light Company was actually paying its bond interest in New York City at the time this action was instituted and had outstanding bonds which were payable, principal and interest, in New York State, we submit that said Company would not have been "doing business" in New York State at the time so as to give the Courts in said State jurisdiction over its person by service of process on one of its officers found there.

We submit that the case of Lumbermen's Insurance Company v. Meyer, 197 U. S., 407, is not analogous to the case at bar. That case involved an insurance company of the State of Pennsylvania, whose principal business was to solicit and write insurance, and to pay the amount of its policies when losses occurred. It appears in that case that one-third in amount of the Company's policies covered property situated in New York State, that it continually sent representatives into New York State to solicit and get business (one of the objects for which it was incorporated) and in its policies it agreed that the Company would either pay the amount of the loss or rebuild at its own expense, an act which obviously could not have been performed except at the place of loss. That upon the occurrence of losses it sent its representatives into this State to negotiate settlements, and

make adjustments under the policy and it was one such representative or adjuster who was served with process. The Court in that case rightly held that the Insurance Company was doing business in New York, and upheld the service of process as valid, but it seems quite clear that the facts in that case prevent that decision from being a precedent upon which this case can be decided.

The second question which the facts of this case present is whether at the time of the attempted service of process The Toledo Railways and Light Company was doing business in New York State.

Even if it should be held that the mere fact of paying interest coupons in New York State by a foreign corporation constitutes "doing business" in said State, nevertheless the facts disclosed by the record in this case show that The Toledo Railways and Light Company had ceased performing said act in 1909—five years before the attempted institution of this suit—when the Company defaulted in the payment of its bond interest and since that time it has never paid such interest (fol. 38). It was this default and the subsequent default in the payment of the principal of these bonds (and also an issue of prior lien bonds) on July 1st, 1909, which resulted in proceedings for the reorganization of the Company, which were consummated in February, 1913, a year before this suit was started (fols. 60-63). The interest, during the years when it was paid, was paid at the office of Kean, Van Cortland & Co. (fol. 38), but after such default said firm ceased to act in any capacity for The Toledo Railways and Light Company (fol. 38).

So the fact appears to be that at the time of the attempted institution of this action The Toledo

Railways and Light Company had not been paying any interest in New York State for five years.

The learned Court below announced a principle in its decision of the motion to quash service, which, we submit is not sustained by any decision or authority which has come to our attention. It is contained in the following language (fol. 54):

> "but it is asserted that no business is or can be done in the State of New York because it refused and neglected to pay a debt which it had promised to pay in this City on July 1, 1909.
>
> It seems to me that this is a very dishonest argument and that the defendant having (in effect)agreed to engage in business in New York for the purpose of paying its debts, should be conclusively presumed to have kept its own agreement until such debt is paid or merged in judgment."

It will be noted that the Court cites no authority to sustain its doctrine, nor has learned counsel for the defendants in error in any of the briefs heretofore submitted, and we submit that the doctrine is a novel one and not sound in law. Why the Company "should be conclusively presumed to have kept its own agreement" is not, we submit, apparent, and what "agreement" the learned Court below refers to is also not clear. The most material agreement which it failed to keep was to pay its obligations when due, and this it defaulted in for the obvious reason that the Company was in financial difficulties and was unable to meet its maturing obligations or to refund or re-finance them. No doubt the learned Court below construes the bond to contain an implied agreement that it would maintain a fiscal office in New York for the payment of its bonds, and that this was the agree-

ment "it should be conclusively presumed to have kept." But why such a presumption in the face of the fact that it had no such office? Why conclusively presume that it kept an implied agreement to maintain an office any more than conclusively presume that it kept its agreement to pay its obligations—both of which it failed to do as the facts stand?

The Court's jurisdiction over the person of a defendant must, we submit, be acquired by virtue of *existing facts* rather than by any *conclusive presumptions.* If the doing of business is a jurisdictional fact which is to form the basis of jurisdiction over the person then, we submit, such fact must be a *reality* and not a fiction derived from presumptions before it can be said that a defendant "is found" within the Court's jurisdiction.

We respectfully submit that the conclusion of the learned Court below, whereby jurisdiction is sustained over the person of The Toledo Railways and Light Company by virtue of a conclusive presumption that it kept its agreement (if there is such a one) to maintain an office, is unsound, and that the Court must look to the facts for its jurisdiction.

It will be noted that the Court below avoids expressly stating that he was relying upon the doctrine of estoppel, although his opinion gives a strong impression that it was something akin to estoppel which he is seeking to enforce upon The Toledo Railways and Light Company. For it is clear that the doctrine of estoppel is quite inapplicable to the present case. Estoppel is a bar which precludes a person from denying the truth of an existing fact which has, in contemplation of law, become settled by the act of the party himself express or implied, and in the law of contracts

if, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped from denying the existence of that fact. It will be noted that the law of estoppel applies only where the parties have changed their legal positions or acted upon the representation of a fact as existing, and has no application whatsoever to an agreement to do something in the future. The law of estoppel has no bearing upon the situation in which the aggrieved party claims that he has changed his legal position by virtue of a promise to perform an act which the other party made. In such a case a simple cause of action for breach of contract lies.

Another instance in which the learned Court below has, we submit, fallen into error is contained in the following statement:

> "The contract evidenced by the bonds became, therefore, a New York contract.
>
> Obviously the contract could not be performed, the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York."

This proposition has been refuted by the Supreme Court of the United States. It has been held by this Court, in a recent decision, that the fact that a cause of action arose in New York State was not sufficient to give the Courts of that state jurisdiction over a corporation foreign thereto unless, in addition, such corporation was doing business in New York. This was the case of St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218. The defendant in that action, as appears from the opinion of the Court, was a railroad company which agreed to transport goods to New York City. It failed to do so. By reason of that fact, the

Court concluded that the cause of action had accrued in New York State. Service in that action was made upon a resident director and in the motion to vacate the service, the Court sums up the questions presented by the motion as follows (p. 226):

> "In this class of cases where it is undertaken to hold a corporation personally liable in a foreign jurisdiction, *two* questions ordinarily arise: *the first, Was the corporation within the jurisdiction in which it is sued? the second, Was process duly served upon an authorized agent of the corporation?* As to the latter question, there is little difficulty in this case. The *cause of action having accrued in New York* by the failure to keep the contract for the safe delivery of the goods there, the service could be properly made under the New York statute, in the absence of other designated officials, upon the resident director. Pennsylvania Lumbermen's Mut. F. ins. Co. v. Meyer, 197 U. S., 407.
>
> "*The other question* as to the presence of the corporation within the jurisdiction of the court in which it was sued raises more difficulty. *A long line of decisions* in this court has *established* that in order to render a corporation amendable to service of process in a foreign jurisdiction, *it must appear that the corporation is transacting business in that district* to such an extent as to subject it to the jurisdiction and laws thereof."

We can paraphrase the opinion thus stated in the following language:

Even though the cause of action against a foreign corporation arose in New York State and the service of process was made by delivering the same to a resident director, such service is invalid if the corporation was not transacting business in said State at that time. The Court in that case,

after examining the facts therein, determined that the Company was so doing business. It found that it maintained an office in New York City with a general eastern freight agent and a traveling freight agent and through said office, it transacted business incident to the operation of a railroad.

It is apparent that the decision of the learned Court below in this case is in direct conflict with the decision of the United States Supreme Court in the Alexander case, *supra;* for the Court below has concluded that because the contract was to be performed in New York, therefore, said performance could not be completed unless plaintiff-in-error was doing business in New York. In other words, by the very performance of its contract, or the agreement to perform in New York, it was *ipso facto* "doing business" in New York. Whereas the United States Supreme Court in the Alexander case, *supra,* when dealing with a cause of action arising upon a contract to be performed in New York, concludes that this fact alone does not confer jurisdiction in New York but that another question must be decided, to wit, was the corporation doing business in New York?

We also beg to bring to this Court's attention another expression which occurs in the opinion of the Court below, and which concerns a question of fact. That is this: "It (plaintiff-in-error) has maintained officers within the State of New York; Mr. Frueauff is one of them" (fol. 53). We maintain that the record in this case can be searched in vain for any evidence to support this statement. It is admitted, of course, that Mr. Frueauff is a Director and Vice-President of The Toledo Railways and Light Company, and that he resides in New York State. But this fact, of course, is not sufficient to confer jurisdiction.

See,

Connolly v. Mathieson Alkali Works, 190 U. S., 406, and
Kendall v. American Automatic Loom Co., 198 U. S., 477.

In order to confer jurisdiction it must appear in addition that the Company was doing business in New York, and that the officer in question was representing the Company in its business. What does the record disclose? Mr. Coates, the president of the Company, at Toledo, swears in his affidavit that Mr. Frueauff, although a director and vice-president, has never been actively engaged in, or been connected with, the executive management of The Toledo Railways and Light Company, nor has he ever performed any executive duties in connection with said offices (fol. 23). Mr. Frueauff, in his affidavit, swears to the same facts, and further states that he has never represented The Toledo Railways and Light Company in any business or transaction in New York State (fols. 25, 38), and that he receives no salary from The Toledo Railways and Light Company as a director or vice-president, or in any other capacity (fol. 38).

It is difficult to see how the learned Court below could have come to the conclusion that The Toledo Railways and Light Company was *maintaining* Mr. Frueauff as vice-president in New York State.

Counsel for defendants-in-eorror point to various facts that appear in the records both from Mr. Frueauff's own affidavits and those submitted by defendants-in-error. It appears that Mr. Frueauff is a member of the firm of Henry L. Doherty and Company, public utility financiers and experts (fol. 36) and as such are interested in a corporation

known as Cities Service Company, a Delaware corporation, which owns public utility securities of operating companies in various parts of the United States and Canada; that in February, 1913, a reorganization of The Toledo Railways and Light Company was consummated whereby practically all of the outstanding securities of The Toledo Railways and Light Company were gathered up in a holding company formed for that purpose known as Toledo Traction, Light and Power Company (fol. 61 *et seq.*); that the firm of Henry L. Doherty and Company underwrote such of the preferred and common stock of the new Company which was not subscribed for the old stockholders (fol. 42); that the stock so underwritten was acquired by Cities Services Company and amounted to approximately 30% of the outstanding stock of the new Company; that the firm of Henry L. Doherty and Company is frequently consulted as public utility experts on financial engineering and other problems by public utility companies including The Toledo Railways and Light Company, for which said firm receives a consideration (fol. 37). Counsel for defendants-in-error has also included in their affidavits contained in the record, excerpts from Poor's Manual and bond circulars, in which occur expressions that Doherty and Company have "assumed the management" of The Toledo properties, and that the voting trustees of the new Company "will contract with us (Doherty and Company) for the management of the property."

We submit that the record is clear that The Toledo Railways and Light Company is being managed by its officers in the City of Toledo as evidenced by the affidavit of such officers and that the

vague and loose expressions drawn from financial papers and bond circulars present no basis for a contrary view.

Again we submit that there is no basis in the record for the statement of the learned Court below that the plaintiff-in-error "has maintained officers in New York State."

In conclusion of this point, we again reiterate that on all the facts disclosed in the record The Toledo Railways and Light Company was doing no business, maintaining no office and had no property in the State of New York at the time of the attempted service of process in said State; and that by reason of the foregoing the Court below acquired no jurisdiction over the person of The Toledo Railways and Light Company, and that, therefore, the judgment of the Court below is a nullity.

POINT II.

The plaintiff-in-error has preserved its right to challenge jurisdiction in this action.

After attempted service of process herein, plaintiff-in-error appeared specially for the purpose of effecting a removal to the United States District Court (fol. 10). After removal, it appeared specially for the purpose of moving to quash service (fol. 19). This is strictly in accordance with the principles laid down in the cases of Goldey v. Morning News, 156 U. S., 518, Martin v. B. & O. R. R. Co., 151 U. S., 673; Wabash Western Railway Co. v. Brow, 164 U. S., 271, Cain v. Commercial Publishing Company, 232 U. S., 124.

Upon the denial of the motion to quash service of process there was no opportunity to appeal until after final decree. (See McLish v. Roff, 141 U. S., 661.) And there was nothing for the defendant Company to do in order to preserve its rights but file its answer to the merits. After final decree opportunity was then offered to appeal direct to the Supreme Court of the United States on the jurisdictional question.

Board of Trade v. Hammond Elevator Co., 198 U. S., 424.

Remington v. Central P. R. Co., 198 U. S., 95.

Kendall v. American Automatic Loom Co., 198 U. S., 477.

When this case came on for trial before Grubb, J., the learned Court was of the opinion that by filing answer to the merits the plaintiff-in-error had effected its right to urge the jurisdictional question, but this question has been disposed of by Wabash Western Railway Co. v. Brow, *supra*, and St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218. The procedure established in the latter case was followed precisely in bringing this case from its inception to the perfection of the present appeal, with the exception that in the Alexander case counsel for the Railroad Company actually participated in a trial before a jury and a judgment for money damages was awarded against the Railroad Company.

In view of the above decisions there can seem to be no question that the plaintiff-in-error has fully protected its right to urge the jurisdictional question before this Court on this appeal.

POINT III.

It is respectfully submitted that judgment in this action should be reversed.

Respectfully submitted,
CHARLES A. FRUEAUFF,
Counsel for Plaintiff-in-Error.

BRIEF OF DEFENDANTS IN ERROR

INDEX.

CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1916.

THE TOLEDO RAILWAYS & LIGHT COMPANY, Plaintiff-in-Error, against WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants-in-Error.	No. 200.

BRIEF OF DEFENDANTS-IN-ERROR.

Preliminary Statement.

This is a writ of error sued out by The Toledo Railways & Light Company, plaintiff-in-error, to review a judgment rendered against it by the United States District Court for the Southern District of New York, in the amount of $36,036.05, entered in the office of the Clerk of the said court on the 26th day of June, 1915 (Record, p. 31), after trial before the said Court and a jury (Record, p. 31). The claim of a right to a direct review in this court is founded upon the certificate of the Trial Judge that the question of the jurisdiction of the Court over the person of the defendant corporation was in issue (Record, pp. 36-37).

The plaintiffs are the executors of the last will and testament of one Harford B. Kirk, during his lifetime a citizen of the State of New York, and are themselves, respectively, citizens of the State of New York and of the State of Massachusetts. The defendant is a corporation organized under the laws of the State of Ohio (Record, p. 5).

The judgment represents the amount due upon twenty-five (25) bonds, with certain coupons attached thereto, issued by The Toledo Railways & Light Company (hereinafter referred to as the "defendant") on the 1st day of August, 1901, and by their terms made payable (as is the interest thereon) *at the fiscal office of the company in the City of New York* on the 1st day of July, 1909 (Record, p. 3).

The action was instituted on the 29th day of June, 1914, in the Supreme Court of the State of New York, by the personal service within the state of a summons and complaint upon one Frank W. Frueauff (Record, p. 5), a resident of the State, who at the time of the service of the summons was a vice-president of the company (Record, p. 12), and for a year or more prior thereto had been one of its directors (Record, p. 5). On the 21st day of July, 1914, as the result of an application made by the defendant, the action was removed to the United States District Court for the Southern District of New York (Record, p. 7), and on the 12th day of September, 1914, the defendant moved before that court to vacate and set aside the service of the summons and complaint, on the ground that the service thereof

> "was not sufficient to confer upon the District Court of the United States jurisdiction over the person of the defendant, and was not due service upon the said defend-

> ant corporation, inasmuch as the said corporation is organized under the laws of the State of Ohio, maintains no office in New York State, does no business, and owns no property therein" (Record, p. 10);

upon this application the defendant procured from the Court a restraining order staying all proceedings pending the decision of the said motion, and directing that the defendant's time to plead or make such motion relative to the complaint as it might be advised be extended until five days after the entry of an order therein and the service of notice of entry thereof (Record, p. 10).

On the 7th day of October, 1914, an order was made by the said District Court denying the motion, reciting that in the opinion of the Court the admitted facts sufficed for such denial, and granting to the defendant leave to answer or demur in the said action on or before the 15th day of October, 1914 (Record, p. 27).

On the 10th day of October, 1914, the defendant, having secured by means of these orders of the Court and otherwise a delay of eighty-two days in its time to plead,* filed its answer—wherein it set up defenses, including a denial of certain of the allegations of the complaint, what purported to be an affirmative defense on the merits, and what purported to be the defense that the Court had no jurisdiction over the person of the defendant in the action (Record, pp. 27-30).

This is pleaded in the following terms:

> "Ninth. That the plaintiffs above named attempted to institute this action and to serve process in the State of New York upon

* Sections 421, 422 of the New York Code of Civil Procedure provides (printed at page 42 of this brief).

> the defendant herein by delivering within said state a copy of the summons and complaint to one Frank W. Frueauff, a Vice-President and Director of the Company, who resides therein. *That at the time of the attempted institution of this action,* Toledo Railways & Light Company owned no property in New York State, maintained no office and transacted no business herein. Upon information and belief, that the attempted service of said process was invalid and ineffective and conferred no jurisdiction upon this Court over the person of the defendant and that by reason thereof, this Court has no jurisdiction over the person of the defendant in this action" (Record, pp. 29-30).

By means of the interposition of this answer the defendant succeeded in delaying the trial of the cause for an additional eight months, so that the plaintiff was prevented from securing the judgment to which he was concededly entitled on the merits until the 18th of June, 1915 (Record, p. 31).

Upon the trial, the defendant abandoned all the defenses interposed in the answer, including the defense of lack of jurisdiction above set forth, and confined itself to an attempt to procure the Trial Judge to review the ruling made by another District Judge on the motion to quash the service of the summons and complaint made prior to the interposition of the answer. The practice adopted was a peculiar one. The motion addressed to the Trial Court was not an application to renew the motion to quash the service, such as would have permitted the plaintiffs to introduce by means of answering affidavits such reply thereto as might be available to them, including any facts that they might have discovered since the original motion was made and denied, or such as they had been unable to

present on that original motion, but was based upon *all* the motion papers submitted on the first motion, including the affidavits submitted on the part of the plaintiffs, and was thus an attempt to procure from the Trial Judge a review of the decision made by a Judge of co-ordinate jurisdiction. The motion thus made the Trial Judge refused to entertain on the ground both that the matter had already been decided, and that conceived as an original motion it was made too late, since made only after the filing of an answer on the merits (Record, p. 36).

Having made this motion and renewed it at the close of the case, and having recorded his exceptions to the denials thereof, the defendant desisted from any further participation in the trial, and offered no evidence in support, either of his alleged defense on the merits or of the allegations contained in his answer relating to his claim of the lack of jurisdiction over the person of the defendant. And, accordingly, after the submission of evidence on the part of the plaintiffs, which has not been included in the record, by means of a bill of exceptions or otherwise, the Court directed a verdict in their favor for the full amount of their claim (Record, p. 31).

Thereupon the defendant sued out its writ of error, dated July 2nd, 1915, to review the judgment entered upon the direction of this verdict and upon the said writ of error and assignments of error, dated July 1, 1915, and a certificate of the Trial Court, dated the same day, and without any bill of exceptions, it seeks a review of the said judgment in this court.

Upon the record thus presented, the following questions arise for the determination of this Court:

1. Whether the motion to quash the writ was properly decided in the first instance.

2. Whether such objection to the jurisdiction as might originally have been effective was waived by the invocation of the powers of the Court through the application of the extensions of time to plead and the acceptance of the benefits conferred by the orders extending the time to plead.

3. Whether in the absence of any offer on the part of the defendant to introduce evidence bearing upon the jurisdiction of the Court over the person of the defendant, and in the absence of a bill of exceptions, the writ of error brings before this Court any question which it will review.

I.

The facts adduced on the original motion to quash the service of the summons and complaint suffice to establish that jurisdiction over the person of the defendant had been rightfully acquired.

The Facts.

In the affidavits submitted to Judge HOUGH on the motion to vacate and set aside the service of the summons and complaint the following facts were set forth:

On August 10th, 1901, the defendant corporation executed and delivered to the United States Mortgage & Trust Company of the City of New York a mortgage or deed of trust whereby it conveyed to that company "all real and personal prop-

erty, rights, privileges, grants and franchises of said" (defendant) "company, including all properties and rights thereafter to be acquired by it or consolidated with it" (Record, p. 23), and thereby brought within the State of New York, constructively at least, and subjected to the jurisdiction of the courts of that state everything it possessed or could thereafter acquire, including even the franchises granted to it by the state of its incorporation. It is to be assumed that this contract was executed or delivered within the State of New York, since at the time of its execution trust companies organized under the laws of that state were forbidden to transact any business elsewhere than in a city named in the certificate of incorporation, which of course was required to be a city within the State of New York (see Laws of 1893, Chapter 696).*

The transfer of all its property was made to secure an issue of bonds in the aggregate amount of $1,200,000—of which the bonds in suit formed a part—which could be authenticated and made available for its uses only through a certificate to be executed by the said trust company (Record, p. 23), and hence by an act which could only be performed within the State of New York. And thus the very obligation upon which the suit was brought *came into being* through an act necessarily *performed* within the State of New York.

The bonds, themselves, and the interest thereon were made payable *"at the fiscal offices of said company"* (the defendant corporation) "in the City of New York," so that the contract involved therein was agreed to be *performed* within the State of New York (Record, p. 22).

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* Printed at page 42 of this brief.

For a number of years the interest on these bonds was actually paid at an office in the City of New York (Record, p. 19); and it appears inferentially that until the month of October, 1913, the corporation kept within the State of New York property of a nature unspecified (Record, p. 12).*

In February, 1913, after having defaulted on the payment of its bonds when they became due (Record, p. 3), the firm of Henry L. Doherty & Co. undertook a "reorganization of the securities" of said company (Record, p. 18), and advertised, as one of the elements of the said reorganization of the securities of the company, that they had an arrangement whereby they were to agree to direct the management of the company for a period of five years (Record, p. 21); and in April, 1913, Frank W. Frueauff, the person who has served with process in this action (who was a member of the firm of Henry L. Doherty & Co.) (Record, p. 18) became a director of the said defendant company (p. 13) in pursuance, as it may reasonably be presumed, of the agreement above described, and in like manner, also presumably in pursuance of the said agreement, he became vice-president of the company in January, 1914 (Record, p. 13), five months before this action was begun, while his partner, Mr. Henry L. Doherty, also a resident of the state, and another person also associated with the firm who was a resident of New York, became directors of the said company (Record, p. 19).

By the said motion papers it appeared, therefore, that the company was being sued upon an obligation having its legal inception within the State of

*This inference is drawn from the statement contained in the affidavit of Frank R. Coates, President of the corporation, that the "said defendant company has not now, nor has it had since the month of October, 1913, any property in the State of New York."

New York, which by its terms was to be performed, not merely within the State of New York, but *at an office to be maintained by the company in* that state, and which was secured by the transfer of all its assets to a New York corporation. And by the said papers it appeared further that the said company was endeavoring to escape an exercise by the Courts of the State of New York of their powers to enforce the obligations thus undertaken solely on the theory that, by failing to perform those obligations and by failing to continue the office within the state until they had been performed, it had succeeded in exempting itself from the jurisdiction of the New York courts and had thereby created a situation whereby those who had relied upon its promises, and who had become entitled to the fulfillment of those promises within the state, were relegated to the expense and inconvenience of a proceeding to be instituted in the Ohio courts, in order to secure their just rights.

This contention, as well as the contention that Mr. Frueauff—by swearing that he had never been "*actively*" engaged in or connected with the "*executive*" management of the defendant corporation in any business or transaction in the State of New York—had divested himself of the representative character which his position as director and vice-president presumably imposed, and which the laws of the State of New York attribute to him, impressed the learned District Judge as "a very dishonest argument" (Record, p. 26). And hence, without directing such an inquiry as might otherwise have been had before a master to test the ingenuousness of the general allegations made by the officers of the defendant in their affidavits, and without calling upon the plaintiffs for such further proof as might have been adduced by

means of such an investigation, he decided that the "admitted facts" were sufficient to justify a decision, and denied the motion to quash —leaving it to the defendant to reassert its challenge, if it chose, through an answer under which the facts might be ascertained by means of the production of witnesses and documents and the truth might be sifted by the processes of cross-examination, for which the trial would offer full opportunity.

Of the opportunity thus afforded the defendant declined to avail himself; and, while it filed an answer under which evidence might have been introduced to substantiate its contentions, it declined to offer any evidence on the issue or to subject its officers to a cross-examination with respect to the matters to which they had sworn with such freedom in their affidavits.

That the characterization of the argument by the learned District Judge was merited, we conceive that no one would undertake to deny; and the sole question for consideration, therefore, upon this branch of the case is, whether, in spite of its dishonesty, it must be permitted to prevail.

The Law.

A consideration of the principles upon which the jurisdiction of courts of one state over corporations organized in another has been challenged makes it, as we conceive, transparently clear that this question is to be answered with an emphatic negative.

It is impossible, of course, to posit any particular fact or series of facts or circumstances as the universal and inevitable conditions to the ac-

quisition of jurisdiction over a foreign corporation, and each case as it arises must necessarily be left to be determined on its own particular facts.

Washington-Virginia Railway Co. v. *Real Estate Trust Co.*, 238 U. S., 185, 186.
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S., 218, 228.
Commercial Mutual Accident Co. v. *Davis*, 213 U. S., 245, 255.

But the principle underlying the decisions whereby the criteria to the existence of the jurisdiction have been established is clear and well settled. *Jurisdiction attaches as the result of acts indicating the submission by the corporation to the exercise of the judicial power of the state.*

Washington-Virginia Ry. Co. v. *Real Est. Trust Co.*, 238 U. S., 185, 186.
St. Louis S. W. Ry. Co. v. *Alexander*, 227 U. S., 218, 227.
Lafayette Ins. Co. v. *French*, 18 How., 404, 407.

"As this court has had frequent occasion to say, each case of this kind must depend upon its own facts, and the question is whether the defendant corporation had submitted itself to local jurisdiction and was present therein so as to warrant service of process upon it."

Washington-Virginia Ry. Co. v. *Real Est. Tr. Co.*, 238 U. S., at p. 186.

"The inquiry is not whether the defendant was personally within the state, but whether he, or someone authorized to act for him in reference to the suit, had notice and appeared; or, if he did not appear, whether

> he was bound to appear or suffer a judgment by default."
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> *Lafayette Ins. Co.* v. *French,* 18 How., 404, 407.
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> * * * * * *
>
> "We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts" (*ib.,* p. 408).

This submission may be evidenced in divers ways. It is implied whenever a foreign corporation causes or permits a general appearance to be entered in an action brought against it, or enters an answer upon the merits without first reserving a right to object to the jurisdiction.

> *Lafayette Ins. Co.* v. *French,* 18 How., 404, at 407.

It is implied in spite of the reservation of the right to object to the jurisdiction whenever the foreign corporation becomes an actor in the action.

> *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S., 286, 290.

It will result from an express promise made to an individual or class of individuals, and contained in a contract entered into with them or for their benefit, though in such case it is available only to those for whose benefit it is made.

> *Woodw[redacted]* v. *Mutual Life Ins., Co.,* 178 N. Y., 485, 490.
>
> *Hunter* v. *Mutual Reserve Life Ins. Co.,* 218 U. S., 573, 587.

(In the first of these cases a stipulation in regard to service of process, incorporated in the designation of an agent, made pursuant to the laws of the state, was held to become an obligation of the company "precisely as though it had been incorporated in the policies," and this reasoning was quoted with approval in the *Hunter* case, *supra*).

It will result also from an express contract made with the state evidenced by the acceptance of the terms imposed by the state as the condition of an exercise by the corporation of the privilege of doing business within its borders, and in that case, it is as comprehensive in its scope as the terms in which it is expressed.

> *Bagdon* v. *Phil. & Read. C. & I. Co.*, 217 N. Y., 432.

It is implied from the exercise of the privilege of doing business within the state, even though there is no express compliance with the conditions imposed by the state statute, but in that case it is limited to an acquiescence in the jurisdiction of the courts of the state over controversies resulting from the activities conducted within its borders.

> *Wash.-Va. Railway Co.* v. *Real Est. Tr. Co.*, 238 U. S., 185.
>
> *Old Wayne Life Ass'n* v. *McDonough*, 204 U. S., 8, at p. 21.
>
> *Connecticut Mutual Life Ins. Co.* v. *Spratley*, 172 U. S., 602.
>
> *Lafayette Ins. Co.* v. *French*, 18 How., 404.

When the submission to the jurisdiction is sought to be based upon the transaction of business within the state, the extent and nature of the

business to which that effect will be accorded is dependent in some measure upon the relation of the cause of action to the transaction had within the state, and decisions bearing upon the nature or frequency of the acts necessary to constitute a doing of business, such as would subject the corporation to the operation of tax laws or to the exercise of the visitorial powers of the state, are of little or no criterial significance.

In order to constitute a complete submission to the jurisdiction such as will sustain the exercise of the powers of the Court in suits brought to enforce transitory causes of action arising in other jurisdictions, it may be necessary to establish an express contract with the state, thus unlimitedly to submit to its jurisdiction.

> *Bagdon* v. *Phil. & Read. C. & I. Co.,* 217 N. Y., 432.

In order to establish a submission sufficiently general to sustain the jurisdiction of the state courts in an action arising within the state, but unrelated to the activities upon which the submission is predicated, it may be necessary to establish a continued and active exercise by the foreign corporation of its functions within the state. On the other hand, where the cause of action is based upon a transaction had within the state or upon a contract with a resident of the state which by its terms is to be performed within the state, a series of acts, or perhaps even a single act, done in connection with that contract or with contracts of like character may suffice to evidence the submission to the jurisdiction.

> *Conn. Mut. Life Ins. Co.* v. *Spratley,* 172 U. S., 602, 610, 611.

Mut. Reserve Fund. Life Ass'n v. *Phelps,* 190 U. S., 147.
Penn. Lumbermen's Ins. Co. v. *Meyer,* 197 U. S., 407.
Commercial Mut. Accident Co. v. *Davis,* 213 U. S., 245, 246.
Lafayette Ins. Co. v. *French,* 18 How., 404, 407.

Thus, an insurance company, which has once been licensed to do business within the state, will be held to be continuing to do business therein for the purpose of sustaining the jurisdiction of the Courts over an action upon a policy written during the period when it was in active conduct of business within the state solely by permitting those policies to remain in force, and by accepting either within the state or at its home office the premiums payable on those policies.

Conn. Mutual Life Ins. Co. v. *Spratley,* 172 U. S., 602, 610, 611.
Mutual Reserve Fund Life Ass'n v. *Phelps,* 190 U. S., 147.
Commercial Mut. Acc. Co. v. *Davis,* 213 U. S., 245, 255.

The acts upon which this Court reached its conclusions in the case last cited appear in the following quotation from its opinion (pp. 255-256):

> "Was the defendant doing business in the State of Missouri? The record discloses, and the Court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of

> the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy."
>
> * * * * * *
>
> "We are of opinion that the finding of the Court in this case is supported by testimony, and that the corporation was doing business in Missouri."

And an insurance company which has never sought or obtained leave to do business within the state, which has never maintained within the state an agency for the purpose of writing policies therein, has never sent its agents within the state for the purpose of direct solicitation of business, which has accepted applications for insurance from residents of the state only when sent to it through the mails directed to its home office, has never issued any policies within the state, and whose policies are not payable within the state, will none the less be held to have been doing business within the state to an extent sufficient to sustain the jurisdiction of the state courts over an action brought by a resident policy holder on his policy if it does no more than send its agents within the state to view the premises to which the policy applies, and to attempt to adjust the losses payable under it.

> *Penn. Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S., 407, 414.

In this case the basis for the conclusion that the insurance company, whose activities were limited to the acts above set forth, was none the less doing

business within the state, are set forth in the opinion in the following terms (p. 414):

> "As the policy insures against loss, it, of course, contemplates that such loss may occur; and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated. When, under the terms of the contract, the company sends its agent into the state where the property was insured and where the loss occurred, for the purpose of adjustment, it would seem plain that it was then doing the business contemplated by its contract, within the state."

If these principles be applied to the situation revealed by the motion papers presented to the Court on the motion to quash, it becomes manifest that denial of that motion is to be sustained on two grounds:

1. On the ground that the activities which those motion papers disclose constituted a doing of business sufficient to invest the courts of the state with jurisdiction over the cause of action in suit; and

2. On the ground that the instrument upon which the suit was based constituted an agreement available to the plaintiffs which estopped the defendants from denying either that it was doing such business or that it was subject to the jurisdiction of the courts of the state.

A.

The transactions had by the defendant within the state constituted a submission to its courts sufficient to sustain their jurisdiction over the cause of action involved in the case at bar.

It may be possible to assert that a corporation that has executed within the state a pledge of all its assets to secure an obligation payable within its borders, which has appointed a resident of the state as its agent to authenticate within the state the evidences of the obligations there secured, and to register their transfer, which has invested that agent with exclusive powers to perform these functions and which for a series of years has maintained a fiscal (*i. e.*, financial) office within the state where it has paid the interest on these obligations has not engaged in such a general conduct of its business within the state as to involve a submission to the courts of that state of all controversies, irrespective of their character or the *locus* of their origin.

But patently, however this may be, to contend that the performance of these acts does not constitute a doing of business such as to empower the courts of the state to enforce the contract arising out of them and with which they are connected, is to ignore the principle upon which the jurisdiction of foreign corporations is founded, and to establish an arbitrary rule unfounded in logic and inconsistent with fundamental principles of justice and plain dealing. Nor is there any warrant in the authorities for so extreme a position.

Indeed, precisely the contrary has been held in the only decision which we have been able to find in which the precise situation has been presented to the Courts, and it was there held that a series of

acts, differing from those in the case at bar only in particulars which rendered the argument in favor of the jurisdiction less potent than those in the case at bar, sufficed to confer it.

Watkins Co. v. *Elliott*, 62 Kansas, 291.

In this case the action was brought on a judgment rendered by a court of record in New York against a land mortgage company. The company was a corporation organized under the laws of Colorado. The suit in New York had been instituted by personal service of summons upon its president. In the New York courts it had interposed no appearance, and judgment by default had been entered against it. The following facts appeared in the action in the Kansas courts to enforce the judgment:

> "The action in New York, as shown by the transcript of judgment sued on, was on instruments called 'real estate debenture bonds.' These bonds showed on their face that they belonged to a certain designated series aggregating one hundred thousand dollars, all payable at the National Bank of Commerce, in the city of New York, and all secured by the assignment to and deposit with a trustee, to wit, The Farmers' Loan and Trust Company of New York, of an equal amount of real-estate mortgages. And it was further specified in the bonds that they did not become obligatory until the trustee had indorsed thereon a certificate of the fact that the specified amount of mortgage securities had been assigned to and deposited with it for the benefit of the holders of the debentures, in accordance with the terms of an agreement entered into between it and the mortgage company. In the case of the bonds sued on, the trustee had en-

dorsed thereon the required certificate. We think this showed a doing of business, a making of contracts, by the mortgage company in the state of New York. The bonds were payable at a designated agency in New York. This involved a remittance of money to the agency to meet the obligations at maturity; it involved a contract of employment, an agency of the one party for the other; it involved an accounting between them; it involved the incurrence of a liability enforceable by the principal against the agent in New York.

The bonds sued on also showed the making of a contract of trusteeship in New York, enforceable in that state. The execution of this contract involved the placing of valuable securities under the protection of the laws of New York and subject to the jurisdiction of the courts of that state. It involved relations between the creator of the trust, the trustee and *cestui que trust*, enforceable in the courts of New York. Now the making of the several contracts and the creation of the several relations mentioned were all shown by the record of the case in New York sued on in this state, and therefore we are entitled to presume, as a consequence thereof, the execution of such contracts and the carrying on of such relations; that is, to presume the transaction of the business the parties agreed to conduct.

The statutes of the state of New York, introduced in evidence upon the trial of the action in this state, authorized the service of process upon the president of a foreign corporation doing business in that state."

The J. B. Watkins Land Mortgage Co. v. *Cornelia U. Elliott,* 62 Kans., 291, at pp. 293-295.

Upon the basis of these facts it was held that the New York courts had acquired jurisdiction of the action, and that the judgment was valid.

It is to be observed that the facts therein stated differ from those presented in the case at bar only in that the bonds which were the subject of the action in that case were made payable at the office of an independent corporation, to wit, the National Bank of Commerce, in the City of New York, whereas, in the case at bar, they were made payable at a fiscal office to be maintained by the company in the City of New York—and that, hence, the facts in the case at bar are to that extent stronger in favor of the plaintiffs' contention than those presented in the Kansas case.

And the principle that the activities of a foreign corporation need not be extensive or continuous to confer jurisdiction over an action brought by a resident of a state to enforce a contract which has been entered into within the state, or which by its terms was to be performed within the state, is amply demonstrated by the decisions of this Court in:

Connecticut Mutual Life Ins. Co. v. *Spratley,* 172 U. S., 602.

Mutual Reserve Fund Life Assn. v. *Phelps,* 190 U. S., 147.

Penn Lumbermen's Ins. Co. v. *Meyer,* 197 U. S., 407.

In the first of these cases, the question involved was the *continuance* of business within the state on the part of an insurance company, and it was held that a company which had once come into the state for the purpose of doing business therein was continuing "to do business" therein by merely al-

lowing its contracts to remain in force and receiving the premiums thereon—in other words, that, having entered into executory contracts within the state, it was to be deemed to be subject to the jurisdiction of the courts of that state so long as the contracts remained alive, and until they had been performed.

And if this is true, with respect to an insurance company which has contracted to pay a sum of money under certain contingencies, it is difficult to perceive why it is not equally true with respect to any other sort of a corporation which has entered into a contract within the state to pay a fixed sum absolutely and at a definite time.

For, of course, the principle is not affected by the circumstance that in the one case the contract involves a part of the business which constitutes the main purpose of the corporate existence, while in the other it was entered into in the exercise of those incidental powers which are necessary to enable it to achieve its main purposes, since jurisdiction is conferred equally by the conduct of either class of transaction.

Pomeroy v. *Hocking Valley R. R. Co.*, 218 N. Y., 530, 538.
Washington-Virginia Ry. Co. v. *Real Estate Trust Co.*, 238 U. S., 185.

An equally convincing illustration of the principle is to be found in *Penn. Lumbermen's Insurance Co.* v. *Meyer* (*supra*), where an insurance company was held to be doing business sufficient to confer jurisdiction upon the courts of New York to enforce a contract of fire insurance made with a resident of the state, merely by sending adjusters within the state to appraise and if possible to agree

upon the extent of the loss, though the company had never attempted to secure authority to do business within the state, had never maintained any agency within the state, had never executed any policies, or accepted any applications therefor within the state, and had never had or sent any agents within the state to solicit risks except in so far as it had permitted its general manager to come within the state to make speeches at lumbermen's conventions in which he urged the advantages of insurance in the company.

And assuredly if the mere performance within the state of an act preliminary to the fulfillment of its contract made with a resident of the state, where the contract of itself was entered into and was to be performed without the state, constitutes a sufficient doing of business to confer jurisdiction, the pledge of the securities and the maintenance of an office within the state for the fulfillment of its contracts made therein and to be performed therein, must constitute such a "doing of business."

And, of course, if this is true, the fact that the office had been discontinued before the contract had been performed, cannot affect the jurisdiction; since, apart from the authorities above cited which conclusively establish that a submission to the jurisdiction once effected by doing business within the state may not thus be withdrawn, it would be manifestly shocking to the most elementary concepts of justice to hold that by failing to fulfill its contract to maintain a fiscal office within the State of New York the defendant could deprive its bondholders of the rights which would have accrued to them had that part of its contract been fulfilled.

Indeed, unless we misread the authorities and their effect, they establish the rule that whenever a foreign corporation comes within the state and

therein makes a contract with or for the benefit of one of its residents, which is to be performed therein, it thereby does business within the state sufficient to vest its courts with jurisdiction to enforce that contract, and thereby consents to submit itself to the jurisdiction of those courts whenever process is served upon any officer or agent thereof upon whom the laws of the state prescribe that service shall be made, provided only that he shall be of such character that notice served upon him may reasonably be expected to reach those officials of the corporation who are charged with the duty of protecting its interests.

> "We consider this foreign corporation, entering into contracts made and to be performed in Ohio, was under an obligation to attend, by its duly authorized attorney, on the courts of that state, in suits founded on such contracts."
>
> *Lafayette Ins. Co.* v. *French,* 18 How., 404, at 408.

B.

The bonds themselves constituted a contract to submit to the jurisdiction of the New York courts, and the defendant is estopped to deny the jurisdiction of those courts.

It is to be observed that the stipulation in the bond is not merely that both interest and principal shall be paid in the City of New York—a stipulation which might consist with the continuous abstention of the corporation from any activity within the state—but that they are to be paid *at the fiscal office of the company in the City of New York,* and that thereby it was advertised that the company would maintain a financial office within the state, and to that extent at least do business

within the state. And when this undertaking is read, as of course it must be in connection with the statutes of the state which asserted the jurisdiction of the courts of the state over foreign corporations in suits brought by residents of the state (*Commercial Mut. Accident Co.* v. *Davis,* 213 U. S. 245, at p. 254), and which were obviously enforceable against any foreign corporation which undertook to avail itself of the privilege of transacting any business therein, it is impossible to conceive the promise to maintain a fiscal office within the state as anything other than an acceptance of the inevitable corollary to the performance of that promise, *i. e.,* as anything other than an agreement to submit to the courts of the state any controversy arising out of the terms of the bonds or the failure to fulfil those terms. In other words, the contract to maintain a fiscal office within the state—read in the light of the state laws—constituted the equivalent of an express promise to do business within the state such as would subject the corporation to the jurisdiction of the state courts in an action brought upon the bonds, and hence, as the equivalent of an express promise to submit such controversies to the jurisdiction of those courts.

And, of course, as we have pointed out above, such a contract is enforceable and suffices either to confer jurisdiction or to estop the corporation entering into it from denying the existence of the jurisdiction.

II.

Upon the record brought to the Court no questions are presented for review.

The right to a review in this court must be predicated upon one of four theories: (1) either that the order made by Judge HOUGH before the interposition of the answer is reviewable; (2) that the rulings made by Judge GRUBB upon the attempt to review that motion is reviewable; (3) that in some manner the question was presented by other proceedings had upon the trial; or (4) that the question is reviewable on the basis of the certificate of the Trial Judge, irrespective of the manner in which it was sought to be raised or the record upon which it was presented.

It remains, therefore, to ascertain whether upon either of these theories any reviewable ruling is brought before this Court.

I.

That the order denying the motion to quash made by Judge HOUGH before the interposition of the answer is not a subject of review in this court is settled beyond question—first, because it is an interlocutory order and, second, because an order denying a motion to quash is always discretionary.

The first of these propositions was held in *McLish* v. *Roff* (141 U. S., 661). The second is amply supported by the logic of the authorities. For it is generally held that the denial of a motion to quash is discretionary, since such an application involves an attempt to secure by a summary proceeding a determination of an issue which, unless the facts are clear, can be decided more adequately

and with a greater assurance that justice will be done through the interposition of a plea under which the rival views of the facts can be more deliberately and more satisfactorily presented and the truth more certainly ascertained; and that a court is therefore vested with a discretion to decline to dispose of the question in this fashion, and to remit the objecting party to the entirely adequate remedy of asserting his claim by means of a plea.

To quote the language of this Court:

> "As a motion to quash is always addressed to the discretion of the court, a decision upon it is not error and cannot be reviewed on a writ of error."
> *United States* v. *Hamilton*, 109 U. S., 63.

To be sure, this language was employed with respect to a motion to quash an indictment, but, the principle is equally applicable to the ruling upon any other pleading or process where the determination of the court is invoked in that form, and is especially applicable to rulings such as that which is here under consideration.

For, obviously, since the denial of the motion to quash establishes nothing final, and leaves it open to the defendant to raise the same question by a plea in abatement unembarrassed by the ruling made on his motion to quash, the denial of his motion imports nothing more than a refusal to dispose of his contention upon a summary application. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.) And, manifestly, it would be absurd to regard other than as discretionary a ruling that the question sought to be litigated involves sufficient doubt or sufficient difficulty of proof to make it expedient that it be determined upon the basis of evidence produced in open court and of the testi-

mony of witnesses sifted by cross-examination, rather than upon the unrestrained allegations contained in affidavits made by interested witnesses. And equally clearly it would involve the gravest injustice to subject the plaintiff in a suit to a risk of a final denial of his rights at the end of a long litigation simply because he has succeeded in inducing the court of first instance to require that the defendant present his application in a manner such as to permit it to be adequately examined.

Moreover, to treat the ruling as reviewable, would lead to the unthinkable result that a plaintiff might and often would be thrown out of court on a ground which he had conclusively established to be without foundation. For the denial of the motion to quash does not debar the plaintiffs from producing upon the trial evidence of the jurisdictional facts or from establishing those jurisdictional facts by proof additional to that available to him when he was called upon to respond to the motion. And the evidence thus adduced upon the trial will often suffice to establish conclusively that the defendant corporation had been doing business within the state when the evidence which the plaintiff had been able to set forth in the affidavits in opposition to the motion to quash was insufficient to establish that fact. And, of course, the jurisdiction may be established by facts adduced upon the trial as well as by facts appearing in the pleadings or other parts of the record.

Sun Printing & Publishing Association v. *Edwards*, 194 U. S., 377, 383.

Under such circumstances, if the denial of the motion to quash were reviewable, in connection with a writ of error sued out to review the judg-

ment entered after the trial of the application, the court would be under the necessity of reversing a judgment entered in a court having jurisdiction both of the subject-matter and of the person of the defendant and entered upon a claim to which there was no defense upon the merits.

Nor can it be urged in answer to this last contention that in such a case the defect in the proof of jurisdiction presented on the motion would have been cured by the subsequent evidence offered on the trial. For that very contention necessarily concedes that that which is the subject of review is the entire record made upon the trial and not the record made upon the motion to quash; and that, hence, it is *not* the ruling upon the motion to quash which comes up for review, but the judgment and the sufficiency of the evidence upon which it has been founded.

Moreover, if the ruling upon the motion to quash were reviewable upon the writ of error sued out after the entry of judgment, the review might be obtained without submitting to the reviewing court the facts adduced upon the trial. For, obviously, a defendant may procure a writ of error to review only the matters appearing upon the face of the record and may procure to be sent to the reviewing court under the writ of error merely the matters thus appearing, since it lies with him and with him alone to determine whether he shall procure a bill of exceptions to be allowed and annexed to the transcript of the record; and hence, if the order is itself reviewable, it follows, as we have said above, that the plaintiff is subject to be defeated in an action to which there is no just defense, upon the theory that he has chosen the wrong forum, whereas upon the trial he has established that his choice

of the forum was as unimpeachable as his cause of action.

It may be suggested that this last argument applies only in a case where there has been a trial of the action, and that it has no persuasive effect in a case where a defendant who after the denial of his motion to quash has submitted to a default and has sued out a writ of error to review a record consisting solely of the papers presented on the motion to quash, the order entered thereon and the judgment rendered upon default subsequent thereto; and that, since this is so, if the argument were allowed any force in a case where a trial had been had, it would result in the anomalous conclusion that the order was to be regarded as discretionary in one case and as non-discretionary in another.

To such a contention the answer is that the argument above made is merely cumulative, and that the order is to be regarded as discretionary in either case, on the ground first stated, namely, that it decides nothing final and in any event leaves the issue to be litigated either upon the trial of the merits or upon the trial of a plea in abatement; and that upon a denial of the motion the defendant is put to his election either to interpose a plea in abatement or *voluntarily to accept* the decision of the motion as *a final determination* of the merits of his contention.

But, however this may be, it is clear that the record presented in the case at bar forecloses any claims of a right to review the order denying the motion to quash. For in the case at bar the defendant *did* file an answer and did go to trial, and he comes before this Court without any attempt to present through a bill of exceptions the record made upon the trial.

And since, in the absence of a bill of exceptions, there is nothing before this Court to establish that the record did not disclose that the corporation was doing business within the state, it follows that the Court will presume that those facts did appear in the record and that the judgment was justified.

Metropolitan Railroad Co. v. *District of Columbia*, 195 U. S., 322.

Nor can there be any doubt that the rules of practice thus advocated lead to salutary results, and that any departure from the rule which regards the denial of a motion to quash as discretionary, and which permits it to be reviewed even in connection with a review of the judgment in favor of the plaintiffs, can lead only to haphazard decisions and to delays and denials of justice.

For, obviously, to compel a plaintiff to litigate the issues upon which jurisdiction depends upon affidavits always involves a hardship. Ordinarily, the evidence through which the submission to the jurisdiction is to be established lies almost exclusively in the possession of the defendant, or is to be secured, if at all, from the mouths of those favorable to him and hostile to the plaintiff, and, ordinarily, therefore, even when the conduct of business has been open and notorious, the plaintiff can prove that fact only if he be accorded opportunity to procure witnesses and documents by subpoena and the further opportunity of establishing the truth by cross-examination, while, if this opportunity is denied him, his right to the forum is left to depend solely upon the elasticity of conscience or of definition in which the defendant's officers are prepared to indulge themselves.

The hardship thus involved is sufficiently acute when upon a litigation thus conducted he is denied his forum at the outset. But in that case, at all events, he is afforded the opportunity of proceeding with his litigation at the home of the corporation with little loss of time and effort. Furthermore, it is to be presumed that a court in the exercise of a wise discretion will not ordinarily grant the motion unless the case is a clear one. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.)

But, if the denial of the motion is subject to review and the litigant who, upon being called to answer the motion, has been so unfortunate as to persuade the Court that he was right, is subject to have the ruling reviewed—so that after the lapse of years, and the expenditure of time, effort and money involved in litigating the merits of his case, he runs the risk of having all his labor rendered nugatory and his action dismissed upon an issue which he has never been accorded an opportunity properly to present—then the situation of the foreign corporation is indeed a favored one and the litigant who undertakes to pursue it anywhere but in the state of its origin, where oftentimes it has no assets and where usually he is accorded the choice of presenting his case imperfectly by means of testimony taken under commission or at a ruinous expense by taking his witnesses to the forum, is in a hard situation indeed.

On the other hand, the denial of a review of such an order imposes no hardship upon the defendant, for it can always re-raise the question by answer, and can always procure the issue to be submitted on the basis of the facts developed through an examination of its records and a cross-examination of its officials; and upon a record thus made, under conditions which afford the plaintiff a fair op-

portunity of establishing the facts, can by means of a bill of exceptions bring the question up for review.

2.

It needs no argument to establish that if the first order denying the motion to quash is not a reviewable order that made by Judge GRUBB is in the same category. For, as we have said, the application upon which it was based purported to be no more than an attempt to secure a review of Judge HOUGH's prior decision; and the ruling made upon that application can have no different standing from that made by Judge HOUGH. Beyond this the record discloses that Judge GRUBB neither permitted a renewal of the motion nor attempted to decide it, but declined to entertain it both because it had already been determined and because he regarded a motion to quash made after the interposition of an answer dealing with the merits as coming too late.

3.

Furthermore even if the application made to the Trial Judge could be regarded as an offer of evidence in support of the plea to the jurisdiction and his ruling therein could be conceived as a refusal to consider that evidence on the trial, the offer and the ruling would not be the subject of consideration before this Court for the reason that they are not incorporated in a bill of exceptions. And, we take it, no question of practice is more firmly established in this court than that it will not review a ruling made upon the trial unless a bill of exceptions has been framed and allowed in the form prescribed by law.

Jennings v. *Phil. & Balto. Railway Co.*, 218 U. S., 255, 256.
Michigan Ins. Bank v. *Eldred*, 143 U. S., 293, 298.

4.

It remains to be considered, therefore, only whether the question is to be deemed to be reviewable in this court merely by virtue of the provisions of the statute to the effect that "appeals or writs of error may be taken from the District Courts * * * to the Supreme Court * * * in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision" (Act of March 3rd, 1891, Judiciary Code, § 238).

That this question is to be answered in the negative is clear upon the authorities, for it is established that the statute does not authorize a review of every decision involving the jurisdiction of the court, but only of rulings made in a form in which they would ordinarily be reviewable. Thus it has been held that a writ of error will not lie to review the order denying the motion to quash where the writ of error has been sued out before final judgment in the case (*McLish* v. *Roff*, 141 U. S., 661), or even after the entry of a decree *pro confesso* subsequent to a denial of a motion to vacate (*Chappell* v. *O'Brien*, 22 App. D. C., 191, 193).

And in the same way it was held under the old practice permitting a review upon a certificate of division in the court below that the review was limited to determinations which were in their nature reviewable, and, hence, that this Court would

not review an order denying a motion to quash an indictment, though the question was certified to it (*United States* v. *Hamilton,* 109 U. S., 63); and that this rule was to be enforced, even though the motion was based upon a claim of lack of jurisdiction in the court below (*United States* v. *Avery,* 13 Wall., 251, 253), and that it applied whenever the ruling thus sought to be brought before the court was of a discretionary nature (*Smith* v. *Vaughan,* 10 Peters, 366; *Packer* v. *Nixon,* 10 Peters, 408, 411).

And, finally, it has been held, if we understand the decision of this Court aright, that, while the certificate of the trial judge may suffice to establish how the question of jurisdiction has been sought to be raised, this Court will review the ruling thus made in the absence of a bill of exceptions only if it appeared that all "the elements necessary to decide the question are in the record" and that the ruling could not have been affected by evidence adduced on the trial (*Nichols Lumber Co.* v. *Franson,* 203 U. S., 278, 282-283); or, in other words, that a bill of exceptions may be dispensed with and a ruling in support of the jurisdiction may be reviewed on the basis of the certificate and the record only when it is clear that a bill of exceptions could "have added nothing to what is patent on the face of the record."

> *Grant Shoe Co.* v. *W. M. Laird Co.,* 212 U. S., 445, 447.

It follows, therefore, that where, as in the case at bar, a trial has been had after the denial of the motion to quash, the court will in no event review the ruling thus made in the absence of a bill of exceptions, since upon a record thus presented to

it it is not advised that all the jurisdictional facts were not established on the trial, and that any failure to establish those facts upon the motion was not remedied through the evidence adduced on the trial.

It follows, therefore, that no right of review is conferred by the certificate of the trial judge in the case at bar, unless the question sought to be certified was raised and determined in a proceeding of a reviewable nature; and that, hence, if we are right in our contention that the orders denying the motion to quash were discretionary, or in our contention that in any event the question sought to be raised thereby could be brought before this Court only upon a record which included a bill of exceptions, it follows that the question is not presented in reviewable form and that the judgment of the Court below should be affirmed.

III.

By procuring the orders extending the time to answer, demur or make any motion concerning the complaint, the defendant waived any right to object to the jurisdiction.

It is established that a defendant who becomes an "actor in the proceeding" thereby subjects himself to the jurisdiction and thereby waives the right to object to the exercise thereof in the action in which he has invoked it.

> *Merchants Heat & L. Co.* v. *Clow & Sons,* 204 U. S., 286, 290.

The precise steps which constitute becoming an actor in the proceeding are said to be in doubt,

but it is submitted that the governing principle must be that a litigant may not blow hot and cold, and that he may not invoke the powers of the court in his behalf, and in the same breath or thereafter deny that it has any power to act to his disadvantage. To be sure, he is not debarred from challenging the jurisdiction by action such as is necessary to insure him the forum to which he is entitled or by steps of a purely defensive nature undertaken after the challenge to the jurisdiction has been overruled, and hence he loses nothing either by removing the case to the federal courts with or without a preliminary reservation, nor by interposing an answer on the merits, after reserving them, but it is difficult to perceive how he can properly be said not to have become an actor in the proceeding when he invokes the power of the court merely to stay the plaintiff in the prosecution of the rights which the law accords him if the court has jurisdiction to enforce them. For by so doing he procures the court to exercise its powers directly in his behalf and to his opponent's detriment without reference to the existence or merits of any defense to the claim asserted.

By this we do not mean to be understood as urging that every application for an extension of the time to plead and acceptance of the time thus conferred would constitute a waiver of lack of jurisdiction over the person. For we recognize of course that the principle which permits a defendant to answer after the motion to quash has been denied, without thereby waiving his right to question the jurisdiction carries with it as a necessary corollary a right to secure such time as may be *necessary* to enable him to interpose the answer. But we do contend that unless the time is sought and granted *on the ground of such necessity,* it does constitute

a waiver of the right to object to the jurisdiction, and that a defendant may not for his own mere convenience, or for the mere advantage of securing that delay which is often a denial of justice, invoke the power of the court to stay the hand of the plaintiff and still insist that the court is without jurisdiction to act in the plaintiff's behalf.

Nor, it is to be observed, will the application of this principle defeat or impair the defendant's rights under his motion to quash. For if, pending the decision of the motion, he interposes his answer, he loses nothing. If the motion is granted, it ends the action; if it is denied, the action stands precisely in the position in which it would have stood but for his ill-founded application. Thus the principle invoked imposes on him nothing save that he shall not utilize the motion merely to hinder and delay the plaintiff.

The advantage of such a rule is strikingly illustrated by the procedure in the case at bar, where the defendant, by means of the motion and orders extending the time to answer, secured merely as an incident thereto and without any pretense that it required any time for the preparation of the pleading, secured nearly three months' delay in answering the complaint, and then interposed an answer which upon the trial, thereby delayed for another eight months, he made no attempt to substantiate.

We are aware, of course, that there are decisions of the lower courts and of other jurisdictions which run counter to this contention, and that cases have arisen in this Court where the question was ignored; but we have been unable to find any case in this Court where the matter was considered, and we are, therefore, emboldened to make the argument in the view that its adoption may settle a

practice whereby one of the law's delays will be obviated.

POINT IV.

If the Court should hold that the question is reviewable and that the facts disclosed by the affidavits were insufficient to establish the jurisdiction of the court, it should remand the case with directions that the issues be sent to a Master to the end that the defendants be afforded an opportunity of developing such further facts as may be available to them in support of their contention.

Otherwise, the plaintiffs will have been deprived entirely of their day in court.

Respectfully submitted,

HOWARD S. GANS,
Of Counsel for the Plaintiffs,
Defendants-in-error.

APPENDIX.

Code of Civil Procedure (New York).

SECTION 1780. *When foreign corporation may be sued.*

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this State.

SECTION 432. *How personal service of summons made upon a foreign corporation.*

Personal service of the summons upon a defendant, being a foreign corporation, must be made by

delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

4. If the person designated as provided in section 16 of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, process against the corporation in an action upon any liability incurred within this State, or if the corporation has property within the State, may after such death, removal or revocation and before another designation is made, be served upon the secretary of state.

SECTION 421. *Appearance of defendant.*

The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney.

SECTION 422 (Am'd 1877). *When defendant must answer before time to appear expires.*

A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in section 479 of this act.

Banking Law.

Chapter 696 of the Laws of 1893 of the State of New York amends *Section 156 of Chapter 689* of the Laws of 1892 so as to read as follows:

"§ 156. *Powers of corporation.*—Upon the filing of any such certificate of authorization of a trust company, the persons named therein and their successors shall thereupon and thereby become a corporation and in addition to the powers conferred by

the general and stock corporation laws, shall have power:

* * * * * *

"No such corporation shall transact its ordinary business by branch office in any city not named in its certificate of incorporation or charter as the place where its business is to be transacted."

General Corporation Law.

(In force in 1901.)

SECTION 15. *Certificate of authority of a foreign corporation.*

No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December thirty-first, eighteen hundred and ninety-two, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this

state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive.

SECTION 16. *Proof to be filed before granting certificate.*

Before granting such certificate the secretary of state shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the State, and a place within the State which is to be its principal place of business, and designating in the manner prescribed in the code of civil procedure a person upon whom process against the corporation may be served within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state. Such designation shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state. If the person so designated dies or removes from

the place where the corporation has its principal place of business within the state, and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation may, after such death or removal, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him.